NO. 80-1131

Supreme Court, U. S.
FILED
JAN 2 1981
CARL SWADAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

VICTOR VIARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the failure to produce to the petitioner and his counsel at trial a statement to which he was entitled under U.S.C. Title 18, §3500; namely, the grand jury testimony of a witness, error requiring the granting of a new trial to the petitioner and denying him due process of law?

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VICTOR VIARS,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MAY IT PLEASE THE COURT:

Comes Victor Viars pursuant to Part V of the Rules of the Supreme Court and petitions the Supreme Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 29, 1980, and in support hereof states as follows:

(a) The question presented for review is:

1) Was the failure to produce to the petitioner and his counsel at trial a statement to which

he was entitled under U.S.C. Title 18, §3500; namely, the grand jury testimony of a witness, error requiring the granting of a new trial to the petitioner and denying him due process of law?

(b) The parties to this proceeding are those contained in the caption of the case in this Court, namely:

Victor Viars - Petitioner

United States of America - Respondent

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(d) The Order delivered in the Court below, that is the United States Court of Appeals for the Sixth Circuit, in number 80-5026, affirmed the judgment of the District Court for the Eastern District of Kentucky. A petition for rehearing was filed and by Order of November 3, 1980, the petition for rehearing was denied. For a copy of the Order of September 29, 1980, see appendix "A". For a copy of the Order of November 3, 1980, see appendix "B". Neither decision is scheduled to be reported.

(e)(i) The date of the judgment or decree (Order) sought to be reviewed is September 29, 1980, and it was entered on September 29, 1980.

(ii) Petition for rehearing was filed and an Order entered denying said petition for rehearing on November 3, 1980. No request has been made for an extension of time within which to petition for certiorari; therefore, the petitioner has to and including January 2, 1981, within which to file this petition.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1).

(f) The statutes and rules involved are as follows:

18 U.S.C. §3500 (for recitation of the same see Appendix "C")

18 U.S.C. §1341 (for recitation of the same see Appendix "D")

Rule 52, Rules of Criminal Procedure (for recitation of the same see Appendix "E")

(g) A concise statement of the case containing the facts material to the consideration of the question presented is as follows:

On April 23, 1979, a Grand Jury at Lexington, Kentucky, in the Eastern District of Kentucky, returned an indictment against the defendant, Victor Viars, charging him with violating Title 18, U.S.C. § 1341. The essence of the charges against Mr. Viars was that he unlawfully devised and intended to devise a scheme and artifice to defraud the citize. of Leslie County, Kentucky, of an honest election of their county officials by means of false and fraudulent pretenses, representations and promises, well knowing at the time the pretenses, representation and promises would be and were false and fraudulent when made and that as a part of said scheme and artifice Victor Viars obtained and voted absentee ballots by offering and paying money to the person in return for their unvoted absentee ballot.

The United States called as a witness, Leonard Bray, who testified that two or three weeks before the election he had asked Victor Viars how many ballots he had and the defendant had replied that he had fifty (50), that Victor Viars had told him he had taken those ballots to Allen Muncy (County Judge Executive of Leslie County), and that he has seen him a week or two before the election with 4, 5, or 6 ballots on the dashboard of his truck. The defendant requested a copy of that transcript under Title 18, U.S.C. § 3500, but was only allowed to see pages 22 and 23 of the same. The Court reviewed the grand jury transcript in camera and denied to the defendant access to the remainder of the same. The grand jury transcript was then sealed in accordance with Title 18, U.S.C. §3500. Because Leonard Bray's testimony before the grand jury relating to the November 1977 election was not made available to the defendant and his counsel under Title 18, U.S.C. §3500, the defendant was denied cross-examination of the witness, Leonard Bray, and denied the opportunity of successful impeachment of the same.

On December 18, 1979, the jury returned a verdict of guilty on all eleven (11) counts. The defendant, Victor Viars, was sentenced on January 2, 1980, to three (3) years on counts 1, 2, 3, 4, and 5, said sentences to be served concurrent to each other; sentenced to five (5) years on counts 6, 7, 8, 9, and 10 to be served concurrent to each other but consecutive to the sentence imposed on counts 1, 2, 3, 4, and 5; and fined $1,000.00 on count 11. The sentence imposed on counts 6, 7, 8, 9, and 10 were suspended and the defendant placed on probation for a period of five (5) years after serving the sentence imposed in counts 1, 2, 3, 4, and 5. The defendant immediately filed Notice of Appeal to the United States Court of Appeals, Sixth Circuit, and prosecuted the same.

(I) The basis for federal jurisdiction in the Court of first instance was an alleged violation of Title 18, §1341, U.S.C.

(J) ARGUMENT

It is the position of the petitioner in this case that the decision of the Sixth Circuit is in conflict with decisions in the Fourth and Eighth Circuits; particularly, *United States v. Derrick*, 507 F.2d 868 (4th Cir. 1974); *Banks v. United States*, 348 F.2d 231 (8th Cir. 1965), and *Lewis v. United States*, 340 F.2d 678 (8th Cir. 1965). Further, the petitioner contends that the decision of the Sixth Circuit is in conflict with the case of *Scales v. United States*, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed. 2d 82 (1961). It is the position of the petitioner that he has an absolute right to have access to "Jencks material", i.e., statements under Title 18, U.S.C. § 3500, and that the decision on whether or not a statement is useful for purposes of impeachment is a decision that rests with the defendant and his counsel. This is an absolute statutory right that he has and anything short of that denies him due process of law.

In *Jencks v. United States*, 353 U.S. 657, 668-669, 77 S.Ct. 1007, 1013, 1 L.Ed. 2d 1103 (1957), we find the following:

> Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less. . . Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when reports are shown to relate to the testimony of the witness.

The Jencks Act, which is Title 18, U.S.C. § 3500, was passed by Congress almost immediately upon the rendering of the Jencks decision with a view towards limiting in certain respects what some people thought was the breadth of the Jencks decision. It statutorially regulates the production of statements. There is no prerequisite in the statute that the materials contained in what is commonly known as "Jencks material" be admissible evidence. It must only relate to the subject matter as to which the witness testified. Admissibility of the statement is not a requirement for production of the same by the United States to the defendant. *Banks v. U. S.*, 348 F.2d 231 (8th Cir. 1965); *United States v. Stone*, 472 F.2d 909 (5th Cir. 1973).

It is recognized by the Sixth Circuit in the case of *United States v. Calabrese*, 421 F.2d 108 (6th Cir. 1970), that one of the main purposes of the Act (referring to the Jencks Act) is to permit defense counsel to use the statement for impeachment purposes. The impeachment that may be employed from such statement is not limited to inconsistent statements between what may appear in the Jencks material

and what a witness has testified in open court. In the case of ***Rosenberg v. United States***, 360 U.S. 367, 370, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959), the Court concluded that "a statement by witness that she fears her memory after the events at issue were poor certainly 'relate to the subject matter as to which the witness has testified' and should have been given to the defendants." The Supreme Court did not reverse in ***Rosenberg v. United States***, ***supra***, since the particular information involved had been afforded to the defendant by other means; however, it is clear from the reading of ***Rosenberg v. United States***, ***supra***, that if that information regarding loss of memory had not been made available to the defendant by means of another document that such would have been error requiring reversal. In the case of ***United States v. Borelli***, 336 F.2d 376, 393 (2nd Cir. 1964), the Court stated the following:

> We can see no reason why a statement that would support impeachment of bias and prejudice does not "relate" to the witness' testimony as much as a statement from any impeachment for faulty memory.

In that case the government had refused to turn over to the defendant a letter of a government witness:

> . . . offering his assistance to the Government "providing we can come to some kind of agreement" and that "something can be done for me," and soliciting "a talk as to whether some sort of arrangement can be made to benefit the U. S. Government and myself. I'm sure everyone in question will be very satisfied."

The Court obviously concluded that this bias and interest on the part of that witness should be made available for impeachment purposes. The Court of Appeals for the Second Circuit went on to conclude:

> If "relate" were to be limited to factual narratives, we should have to consider whether a letter merely proffering a witness' services in return for consideration was within the protection which the Jencks Act confers on the government; but we think the broader construction preferable and, indeed, necessary. See ***Palermo v. United States***, 360 U.S. 343, 350, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959)

Not only is the appellant entitled to any material which could be used for purposes of impeachment whether it be by inconsistent statements, bias or prejudice, loss of memory, prior convictions, or that might establish that the witness was an accomplice; but it is the prerogative of counsel for the defendant on trial to make a determination as to what may be used for impeachment purposes. "Whether the statements may be useful for purposes of impeachment is a decision which rest, of course, with the defendant himself." ***Scales v. United States***, 367 U.S. 203, 258, 81 S.Ct. 1469, 1501, 6 L.Ed.2d 82 (1961) In the case of ***United States v. Meisch***, 370 F.2d 772 (3rd Cir. 1966), we find the following:

> The purpose of requiring the delivery to a defendant of a prior statement "which relates to the subject matters to which a witness has testified" is not solely to provide him a means for obtaining information divulged by the witness's testimony, but to give him an opportunity to use it as he deems fit for trial purposes.

Support for this position is also found in ***Banks v. United States***, 348 F.2d 231 (8th Cir. 1965), and ***Rosenberg v. United States***, ***supra***, at page 371. And it is no part of the district court's function to speculate whether the statement will be of any use for impeachment purposes. ***Banks v. United States***, ***supra***, at page 234.

> Once producibility is established the defendant has an absolute right to the statement, or, in the alternative, to have the testimony of the witness stricken if the government refuses to comply, and failure to so order is reversible error. *Lewis v. United States*, 340 F.2d 678, 682 (8th Cir. 1965).

In the case of *Ogden v. United States*, 303 F.2d 724, 740 (9th Cir. 1962), relative to two statements in issue under Title 18, U.S.C. § 3500, the Court found that the statements related to the subject matter in the broadest terms but concluded that " . . . the test to be applied is not whether the material would be 'relevant' in the evidentiary sense, but only whether it relates generally to the events and activities testified to." The Court said that it was producible if the " . . . material might be useful in framing questions which would be relevant to that subject matter." *Ogden v. United States*, *supra*, 740. "Doubts are to be resolved in favor of disclosure, for the Court necessarily proceeds without the benefits of counsel's more intimate knowledge of the possible significance of particular information for the purposes of impeachment." *Ogden v. United States*, *supra*, 740.

It is the position of Victor Viars that the transcript of the grand jury testimony of Leonard Bray relates generally to the events and activities testified to. The District Court did advise that the matters in the grand jury testimony related to the 1977 election. This in and of itself entitled defendant and his counsel to the production of the entire grand jury transcript because as noted above in the case of *Ogden v. United States* the defendant's counsel is the only one with such intricate knowledge of his case as to be in a position to determine the usefulness of such material for cross-examination purposes at the trial including impeachment of the witness.

If what is contained within the grand jury transcript could have in any way been used for impeachment purposes to show bias or prejudice on the part of the witness, to show prior inconsistent statements on the part of the witness, to show lack of memory, to show that he was an accomplice, or any other manner of impeachment permitted, then he is entitled to the transcript, and the person or persons best able to make that determination as to its utility is the defendant and his counsel.

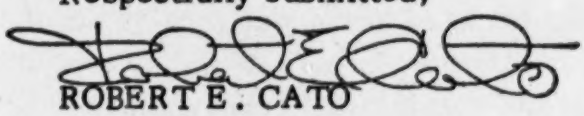
Even though the Court of Appeals for the Sixth Circuit states that it did not reach the merits of the contention of the then defendant and now petitioner, it is obvious from reading the Order filed September 29, 1980, that the witness, Leonard Bray, was involved in the same scheme to obtain absentee ballots as the defendant was alleged to have been and that it could perhaps have been used for purposes of impeachment. The reason the Court of Appeals for the Sixth Circuit did not reach this contention was that it took the position that the substantial rights of the defendant had not been affected. This is in direct conflict with the above decisions of the Second and Eighth Circuits which hold that the rights of the defendant to statements under Title 18, U.S.C. § 3500, are absolute. And in line with the above cases, the person or persons most capable of determining the usefulness of such material are the defendant and his counsel. Who is to say whether or not the transcript would have been of marginal or no assistance to defense counsel? Only defense counsel himself. Not the government. Not the Court.

The real reason that the entire grand jury transcript was not turned over to Victor Viars and his counsel was that there were other cases then pending or indictments anticipated by the United States that involved the same alleged election scheme. The United States did not want

the defense counsel for Victor Viars to view the transcript of Leonard Bray's entire testimony prior to those trials, which could have in effect been done since the defense counsel that was representing Mr. Viars represented certain other defendants; therefore, the defendant, Victor Viars, was denied that to which he was otherwise entitled. This action by the United States was in essence sanctioned by the Sixth Circuit United States Court of Appeals.

Now for the foregoing reasons, Victor Viars, Petitioner herein, urges a Writ of Certiorari to issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NO. _____

VICTOR VIARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I hereby certify that on this the 2nd day of January, 19[redacted], copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; Hon. Patrick H. Malloy, United States Attorney, Federal Building, Barr Street, Lexington, Kentucky 40507; and Mr. John P. Hehman, Clerk, United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio 45202. I further certify that all parties required to be served have been served.

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APPENDIX "A"

No. 80-5026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
SEP 29 1980
JOHN P. HEHMAN
Clerk

UNITED STATES,
Plaintiff-Appellee

v.

VICTOR VIARS,
Defendant-Appellant

ORDER

Before: MERRITT and BROWN, Circuit Judges; GUY, District Judge.*

Defendant, Victor Viars, appeals from a conviction of eleven counts of election fraud, a violation of 18 U.S.C. § 1341. Viars was found guilty of purchasing and voting absentee ballots and upon sentencing received probation, a suspended sentence, and a fine. The Defendant argues two distinct issues on appeal of his conviction: (1) that the Assistant United States Attorney made improper and prejudicial statements in his closing argument; and, (2) that the trial court erred in denying Defendant access to the grand jury testimony of a government witness as required by the Jencks Act, 18 U.S.C. § 3500.

* The Honorable Ralph B. Guy, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting my designation.

Appendix "A"

I. Improper Closing Argument

The Defendant contends that three improper references were made by the Assistant United States Attorney in his closing argument, and that these references singly and collectively

[2]

were prejudicial to the Defendant (appendix pages 3-5, 13). The references included a statement by the government attorney that one witness had testified that a "very unusual number of applications" were sent to one Post Office Box, and the government attorney added that he thought it "unusual also." The second reference was to the fact that ballots left over from the May primary had been burned before they could be examined by the United States attorney. (Kentucky law requires that ballots be burned within 30 days of the election.) The third disputed reference was a statement that "there has got to be other people involved...." Each of these three references, however, were statements of reasonable inferences that could be drawn from properly admitted evidence. Because the government attorney was merely offering to the jury a manner of viewing evidence properly before the court, the statements were within the general boundaries of proper argument.

II. Jencks Act Material

Pursuant to the Jencks Act, 18 U.S.C. § 3500, Defendant requested at trial a copy of the grand jury testimony of prosecution witness Leonardy Bray. The court made an *in camera* review and gave the defense pages 22-23, but denied access to the rest of the testimony, including pages 32-33, which mention the defendant's name. The grand jury testimony arguably shows that the witness was involved

in the same scheme to obtain absentee ballots as the defendant and could perhaps have been used in some way for purposes of impeachment.

[3]

We find it unnecessary to reach the merits of Defendant's contention. Although the court's refusal to require the government to turn over the grand jury testimony was arguably error in violation of the Jencks Act, such action by the trial court, if it be error, did not affect the substantial rights of the defendant as required by F.R.Cr.P. 52(a). The failure to turn over the grand jury testimony is harmless because not only was the prosecution case very strong, even disregarding the witness' testimony, but the grand jury transcript itself would have been of marginal or no assistance to defense counsel. *United States v. Edwards*, 366 F.2d 853 (2d Cir.), *cert. denied* 386 U.S. 966 (1966). Although there may be some minimal impeachment value in the grand jury testimony, it could not have been used effectively on cross-examination without strengthening the government's case. The reason for this is that the undisclosed grand jury testimony reinforces the government's proof of a widespread scheme in the county to buy votes.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX "B"

No. 80-5026

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	FILED NOV 3 1980 JOHN P. HEHMAN Clerk
v.	ORDER
VICTOR VIARS, Defendant-Appellant.	

Before: MERRITT and BROWN, Circuit Judges; GUY, District Judge.*

Defendant petitions for a rehearing of his appeal to overturn a conviction of election fraud through use of the mails, a violation of 18 U.S.C. § 1341. Defendant argued at his first hearing that it was a violation of the Jencks Act, 18 U.S.C. § 3500, for the trial court to deny the defendant access to the grand jury testimony of a government witness. We found that even though the failure to disclose the grand jury testimony was arguably error, it was harmless under F.R.Cr.P. 52(a). Defendant petitions for a rehearing, asserting that he has now read the testimony in conjunction with another case and finds that it would in fact have been "exceedingly helpful."

* The Honorable Ralph B. Guy, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

Appendix "B"

This court gave careful consideration to defendant's claim at the initial hearing. After reading the grand jury testimony we concluded that the testimony would have had some minimal impeachment value. This same testimony, however, if used for the impeachment that defendant desires, would also have

[2]

strengthened the government's case and reinforced the theory that there was a wide-spread scheme in the county to buy votes.

Defendant refers to additional memoranda of interviews with the same government witness. Requests concerning that information are to be addressed to the district court for consideration.

We amend our order of September 29, 1980, page 1, first paragraph, line 4-6 to read: "Viars was found guilty of purchasing and voting absentee ballots and upon sentencing received *a prison term, along with* probation, a suspended sentence and a fine." On page 1, line 2, the phrase "through use of the mails" is to be inserted after "election fraud."

Petition for a rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HELMAN
Clerk

APPENDIX "C"

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding and the

trial is continued to an adjudication of the guilt of the defendant, the entire test of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

APPENDIX "D"

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

APPENDIX "E"

RULE 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.